("ESPs").[48] The Commission intended the CEI rules, absent structural separation, to prevent a BOC from: (i) discriminating in favor of its own enhanced service operations to the detriment of non-affiliated ESPs;[49] and (ii) from providing competing ESPs network connections inferior to those that the BOCs themselves rely on."[50] The CEI obligations were designed to be a transitional model to further fundamental network unbundling through ONA.[51]

ONA safeguards go beyond the CEI requirements to require BOCs to submit ONA plans to unbundle network elements.[52] By requiring BOCs to provide the unbundled "building blocks" of their networks to non-affiliated ESPs, the Commission found that, absent structural separation, ONA "unbundling is essential to give competing enhanced services

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48/ See Computer III Phase I Order, 104 F.C.C.2d at 1039-1042.

49/ The Commission explained that "freed of the structural separation requirements, dominant carriers could realize efficiencies or provide themselves with forms of interconnection that other enhanced service providers could not obtain." See Computer III Phase I Order, 104 F.C.C.2d at 1019.

50/ See Computer III Further Remand Notice at ¶ 18 n.49 (citing Computer III Phase I Order, 104 F.C.C.2d at 1034-58).

51/ See Computer III Phase I Order, 104 F.C.C.2d at 1066; see also Computer III Further Remand Notice at ¶ 18.

52/ The ONA unbundling standard requires that: (i) BOCs obtain unbundled network services pursuant to tariffed terms, conditions, and rates available to all ESPs; (ii) BOCs provide an initial set of basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible; (iii) ESPs participate in developing the initial set of network services; (iv) BOCs select the set of network services based on the expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling; and (v) BOCs comply with CEI requirements in providing basic network services to affiliated and unaffiliated ESPs. See Computer III Phase I Order, 104 F.C.C.2d at 1063-1068; see also Computer III Further Remand Notice at ¶ 7 n.20

providers an opportunity to design offerings that utilize network services in a flexible and economical manner."[53] The overarching goal of ONA was "to promote a fair competitive marketplace for the provision of enhanced services."[54] The Commission required the BOCs to provide plans that comply with ONA as a quid pro quo for lifting structural separation and allowing the BOCs to integrate basic and enhanced services.[55]

Given that the Commission has found both CEI and ONA to serve a vital purpose, absent structural safeguards, in preventing discrimination by BOCs in the provision of enhanced services and promoting fair competition among BOC-affiliated and non-BOC enhanced service providers, the Commission should, at a minimum, address whether the

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53/ See Computer III Phase I Order. In addition to ONA unbundling provisions, the Commission has established additional nondiscrimination ONA safeguards, including customer proprietary network information ("CPNI") rules, network information disclosure rules, and nondiscrimination reporting requirements. See id. at ¶ 28. The Commission has also extended ONA and CEI requirements to GTE Corporation's basic and enhanced service offerings. See Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, 9 FCC Rcd 4922 (1994).

54/ See Computer III Further Remand Notice at ¶ 17.

55/ The Commission stated:

> We consider the development of Open Network Architectures to be the focal point of this proceeding. We conclude that the implementation by AT&T and the BOCs of Open Network Architecture plans, approved by the Commission, is a precondition for complete elimination of the structural separation rules for these carriers.

See Computer III Phase I Order, 104 F.C.C.2d at 1020 (emphasis added). Indeed, the Commission has viewed the approval of BOC ONA plans as a lukewarm half-measure, falling well short of resolving the many competitive issues in the "long-term, evolutionary process" of achieving the ONA vision. See Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3103, 3105 (1990) (the Commission acknowledges that "approval of the initial ONA plans is one step in the process, not the end of it").

imposition of ONA and CEI requirements upon PacTel's PCS Plan is a first step in preventing PacTel from engaging in unreasonable discrimination and in promoting competition both in wireless markets and the monopoly landline local loop. Absent a determination regarding application of CEI and ONA, there is no reasonable basis for the Commission to find that the PacTel Plan will adequately deter anticompetitive conduct by PacTel.[56/]

D. The Commission Can No Longer Defer the Establishment of Meaningful Competitive Safeguards

Despite PacTel's generalized assurances that it intends to comply with "required" safeguards, PacTel obviously intends to reveal as little information as possible about how its PCS activities are to be conducted. PacTel's obvious strategy is to maintain maximum flexibility to claim CMRS or LEC status, or interstate or intrastate jurisdiction, as best benefits its interests in a particular situation, and has arranged its business dealings to preserve and enhance its monopoly power over traditional landline network services.

PacTel has received its PCS licenses for California and Nevada without any conditions to ensure fair treatment of ratepayers or to promote local loop competition. It has already incurred significant expenses to obtain its licenses, including the payment of its winning bids totaling $695,650,000. This spring it already had over 250 people working on

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56/ Cox notes, however, that CEI or ONA nonstructural safeguards, in and of themselves, do not address the critical issue of ensuring that PacTel does not price interconnection or services at a level that prevents PCS from competing with PacTel's monopoly local loop.

PCS matters, it has hired numerous contractors for engineering and site acquisitions, and it is conducting all phases of a start-up business.[57]

Since its decision to allow LECs to provide PCS in their landline monopoly regions pursuant to non-structural safeguards, the Commission has followed a pattern of deferring decisions on critical competitive issues. While it repeatedly expressed concern, the Commission has declined to define new safeguards that plainly are required for PacTel's participation in PCS. The Commission can no longer wait to engage in a major policy analysis on in-region LEC-PCS safeguards until a later time. If the Commission expects PCS to fulfill the competitive vision, it must reject PacTel's Plan and quickly establish meaningful safeguards.

III. PACTEL'S PROPOSED "SAFEGUARDS" ARE INSUFFICIENT TO PROTECT TELEPHONE RATEPAYERS FROM CROSS-SUBSIDIZATION

While PacTel has not withdrawn its Petition for Clarification or Reconsideration, the carrier now professes an intention to comply with the Part 32 and Part 64 accounting rules.[58] The Part 32 and 64 accounting rules and Computer III-type safeguards were not, however, designed to address LEC diversification into quasi-regulated markets that compete against the core LEC monopoly. PacTel's proposed non-structural "safeguards" will

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57/ See "PacTel's Daniel's Tells of PCS Plans," MultiChannel News, May 15, 1995; Pacific Telesis Group Quarterly Report to Shareholders, March 31, 1995 at 2-3. See also Interview with Pacific Bell Mobile Services CEO Lyn Daniels, in PacTel's Shareholder Report (published June 5, 1995).

58/ Plan at 5-6.

not allow the Commission, the California Public Utilities Commission, telephone ratepayers or competitors to determine whether PacTel is properly identifying or allocating all of the correct costs between PCS and its monopoly landline business. Unless the Commission establishes rules that force PacTel to disclose critical information about its dealings with PCS affiliates, PacTel can cross-subsidize at will.

A. Current Provisions of Part 64 Do Not Capture the Data Necessary to Ensure that PacTel Does Not Cross-Subsidize Its Provision of PCS Nor Do Existing Price Cap Rules Solve the Problem

The Part 64 cost allocation rules were developed in the Joint Cost proceeding, initiated by the Commission in early 1986, to establish methods for separating the costs of regulated telephone service from the costs of non-regulated activities of LECs and their affiliates.[59/] The Joint Cost Order provides that "[a]ll activities that are classified as common carrier communications for Title II purposes will be classified as regulated activities for purposes of [the] accounting rules and nonregulated activity cost allocation rules."[60/]

This required regulated/non-regulated cost separation is reflected in carrier ARMIS Reports as two lines on the income statement. one listing the aggregate of "other nonoperating income," and the other listing the aggregate of "investments in affiliated companies."[61/] The purpose of this abbreviated summary reporting was to "determin[e] the costs of interstate common carrier communication services [and] keep regulated common

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59/ See Notice of Proposed Rulemaking, 104 F.C.C.2d 59 (1986).

60/ See Report and Order, Joint Cost Order, 2 FCC Rcd 1298, 1307 (1987) ("Joint Cost Order").

61/ See 47 C.F.R. § 32.7360.

carriers from using the revenues from their regulated services to subsidize nonregulated enterprises and . . . ensure that ratepayers receive their appropriate share of the benefits arising from the offering of regulated and nonregulated services on a structurally unseparated basis."[62/]

This abbreviated accounting treatment is not appropriate for PCS, and is increasingly inappropriate for other new services as LECs diversify into combinations of regulated common carrier services and unregulated services such as video dialtone, interexchange service and voice mail.[63/] First, because of the summary nature of the current Part 64 cost accounting rules, they provide the Commission and other interested parties very little financial information about the wide range of potential investments that are grouped together under "other nonoperating income" and "investments in affiliated companies." Second, because these rules require allocation of costs only between common carrier and non-common carrier services using a carrier's forecast of relative use, they currently provide no mechanism for assuring that costs are in fact properly allocated. Finally, even assuming the FCC modifies Parts 64 to require the LECs to break out PCS costs from monopoly landline and other investments, the Commission has no policy or current oversight concerning PacTel's

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62/ Joint Cost Order, 2 FCC Rcd at 1307.

63/ The Commission already has acknowledged as much by adopting subsidiary cost accounting records and jurisdictional reporting requirements on LEC video dialtone investments. See Telephone Company - Cable Television Cross Ownership Rules, Sections 63.54 - 63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244 at ¶ 173 (1994).

determination of what constitutes a PCS cost as opposed to a telephone cost or a video dialtone cost. PacTel has offered no allocation scheme for Commission consideration.

Proper allocation of the costs of a non-regulated activity, such as the provision of customer premises equipment, normally is easily determined and can be reviewed by inspection of the relevant sections of a LEC's cost allocation manual. Review is inadequate, however, for determining whether the costs associated with a common carrier service should be placed on the regulated telephone side or on the unregulated activity side of the ledger. As one example, each decision by PacTel to extend, replace or upgrade its existing network could arguably be classified as a regulated telephone cost or a PCS cost or a cost properly allocated to another activity.[64/] PacTel has proposed to construct an integrated hybrid fiber-coaxial system that will provide both telephone and video services over the same transmission path. Consequently, each decision to upgrade PacTel's plant and equipment could be seen as a video dialtone cost, a PCS cost, a cost of the basic wireline network, or all three.

The Commission's audit process is not designed to make judgments on these potentially costly -- to ratepayers -- decisions, despite their direct impact both on ratepayers and on the competitive market. Indeed, Part 64 rules give LECs wide discretion to allocate costs between their regulated and non-regulated entities because the three-year forward looking forecast of the allocation of central office equipment and outside plant investment

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64/ Further complicating the issue is PacTel's recent authorization to construct and operate video dialtone systems in these same areas in California. See Order and Authorization granting Pacific Bell authority to construct, operate, own and maintain video dialtone service to selected communities in California, File Nos. W-P-C-6913, W-P-C-6915, W-P-C-6914, W-P-C-6916, FCC 95-302 (adopted July 18, 1995, released August 15, 1995).

between regulated and non-regulated activities is entirely controlled by the subjective judgment of self-interested LEC management. Consequently, without significant changes in current accounting safeguards, PacTel will have enormous flexibility, incentive and opportunity to allocate the majority of its PCS costs to its monopoly landline telephony business.[65/]

PacTel claims that it does not have an incentive to cross-subsidize because PacTel has adopted price cap regulation.[66/] As Cox has previously shown, however, current price cap regulation allows LECs to "game the system" on a yearly basis by moving from high price caps with no sharing to lower price caps with sharing as LEC anticipated revenues and future sharing obligations dictate.[67/] If LECs misallocate costs to regulated telephony, thereby artificially depressing telephony earnings, virtually all of the productivity benefit from the price cap is lost. Consequently, under the existing price cap regime, PacTel has every incentive to transfer costs from its unregulated PCS venture to its captive telephone rate base. Further, recent studies have shown that rates for basic local telephone service would be decreasing over the next few years if rates were based on LECs' actual costs of providing

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65/ Cox's concerns on the PCS front are entirely justified based on the approximately 80% allocation of costs PacTel has proposed to load on telephone ratepayers for the common costs associated with video dialtone. Id. at ¶ 78

66/ Plan at 6 ("[P]rice cap regulation has greatly reduced the incentive of a carrier to engage in cross-subsidization since there is very limited ability to raise rates under price cap regulation.").

67/ See Letter to the Honorable Reed E. Hundt, Chairman, Federal Communications Commission, from James O. Robbins, President and Chief Executive Officer, Cox Communications, Inc., ex parte filing in CC Docket No. 87-266 and CC Docket No. 94-1 (filed June 28, 1995) (attached as Appendix A).

service.[68/] Therefore, it is misleading for PacTel to claim that price cap regulation gives LECs limited ability to raise rates, when the real issue for regulators should be the amount by which rates for service should be decreased.

PacTel cannot be credited with "no ability" to cross-subsidize PCS. PacTel has the incentive and apparent ability to allocate costs to regulated monopoly services to forestall any attempt by regulators to lower these rates. Since state regulators have jurisdiction over local telephony rates they naturally have an interest in protecting their ratepayers from cross-subsidies, but lack of rules on the federal level may well prevent any state review of PacTel's costs. Without meaningful rules from the Commission requiring PacTel to disclose its PCS cost information, regulators in California and Nevada will have no way to protect their citizens.

PacTel and other LECs convinced the Commission to allow LEC participation in PCS on a non-structural separation basis because integration would allow "economies of scope."[69/] The Commission should not, however, be distracted by the alleged benefits of "economies of scope" when establishing necessary safeguards for integrated PCS and landline telephony. In a recent ex parte filing, PacTel asserts that the incremental costs associated with the use of its existing plant to provide interconnection to its own PCS ventures are minimal because of "economies of scope" such as prior investments in implementing an

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68/ See, e.g., Economics and Technology, Inc./Hatfield Associates, Inc., The Enduring Local Bottleneck at 221-227 (1994).

69/ Broadband PCS Order, 8 FCC Rcd at 7751 ("While we recognize the concerns expressed about LEC participation in PCS, we also find that allowing LECs to participate in PCS may produce significant economies of scope between wireline and PCS networks.").

advanced intelligent network ("AIN").[70] This unsupported assertion, however, begs the question of what costs are properly allocated to landline telephony and what costs are passed on in charges to competing PCS providers.[71] Under the current rules there is no way for the Commission or other interested parties, such as the California Public Utilities Commission, to determine whether such costs are improperly allocated to PacTel's telephony ratebase. The PacTel Cost "Accounting" Manual adds nothing to the correct determination of those past investments and expenses.

Because of the Bureau's unwillingness to deal with even the simplest of issues, the question of how the accounting rules of Parts 32 and 64 even apply to PCS is currently unresolved.[72] The Commission must do more, however, than simply modify its rules to clarify how Parts 32 and 64 apply to PCS. It must require LECs to disclose fully all costs and revenues associated with PCS on a line-item basis so that any cross-subsidization would

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70/ See Letter to William F. Caton, Acting Secretary, Federal Communications Commission, from Gina Harrison, Director, Federal Regulatory Relations, Pacific Telesis, ex parte filing in CC Docket No. 94-54 (filed August 1, 1995) (containing the affidavit of Jerry A. Hausman filed in GEN Docket No. 90-314 and ET Docket No. 92-100, May 15, 1993).

71/ As discussed above, PacTel has planned its entry into PCS for several years. Its monopoly network investment decisions have been made with the intention to participate in PCS, and it is likely that PacTel's investment choices were influenced by how these investments funded by ratepayers could be used for PacTel's various business ventures, including PCS. Consequently, while many past investments may not have been made "but for" PacTel's intention to participate in PCS, most, if not all, of the cost of making these investments has likely been allocated to PacTel's landline monopoly business.

72/ See Licensing Order at 7 ("The applicability of Parts 64 and 32 to CMRS services (including PCS) is an issue that has been raised expressly in petitions for reconsideration of the Second CMRS Report and Order, which is currently under consideration by the Commission. . . . We therefore conclude that that proceeding is the proper forum for resolving this issue.")

be detectable on inspection. Disclosure requirements must be imposed on all LEC affiliates involved with PCS activity, not merely on the PCS licensee itself, to avoid corporate structures that otherwise would allow LECs to camouflage their true PCS costs. In this case PacTel has divided its PCS license and PCS activity into at least two separate entities, PBMS and PTMS. PacTel's decision to structure its corporate holdings must not by default allow PacTel to avoid its regulatory obligations. All disclosure requirements should also date back to at least the date PacTel's cellular spin-off was completed,[73/] to capture PacTel's already significant investments in PCS.

Rampant cross-subsidization can be avoided only by revising the rules in a manner that does not leave vital cost allocation decisions to the self-interested LEC. LECs providing in-region PCS must be required to disclose detailed accounting information. Only if this information is available to federal and state regulators and the public, will LECs be less likely to attempt to cross-subsidize. If, however, detailed financial information on LEC in-region PCS is not disclosed, non-allocation, misallocation and cross-subsidization are certain. The question of what is or is not a PCS cost should not be answered by PacTel alone. Federal and state regulators must have access to sufficient financial data to make informed decisions on what costs properly should be included in the telephone rate base. Additionally, the Commission should create a new category within Part 64 for PCS investments.

73/ Moreover, there is no evidence that any of the significant expenditures on PCS strategic planning, consultants and staff realignments that also preceded the cellular spin-off, have ever been assigned to Pacific Bell Mobile Services.

B. Computer III-Type Safeguards Are Inadequate to Govern Diversified LEC Common Carrier Telephony Services

Non-structural safeguards for LEC provision of various enhanced and other non-regulated services have been in effect for less than ten years. Pursuant to the regulations enacted in the Computer III docket, LECs have been permitted to provide enhanced services on an integrated basis with their basic landline service under either CEI or ONA plans.[74/] Structural safeguards were eliminated because the Commission believed that non-structural safeguards could protect competing service providers while avoiding the inefficiencies associated with structural separation.[75/]

Initially, the Computer III non-structural safeguards applied only to LEC provision of enhanced services. Now, the Commission has also determined that "competitive" services such as PCS, and CMRS in general, can be offered by LECs on an integrated basis subject to Computer III-type non-structural safeguards.[76/] In making this threshold determination, however, the Commission did not explore the plain difference between the efficacy of non-structural safeguards in enhanced services markets, where the competitor is not competing directly against the core monopoly, and PCS, where at least some competitors, with the commission's blessing, openly seek to challenge the LEC local loop monopoly.

Since the Commission determined that PCS can be offered by LECs pursuant to non-structural safeguards, the Ninth Circuit vacated and remanded the Commission's

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74/ See, e.g., Computer III Further Remand Notice at 5.

75/ Id.

76/ Broadband PCS Order, 8 FCC Rcd at 7751; Second CMRS Report and Order, 9 FCC Rcd at 1492.

Computer III non-structural safeguard rules. That court was not convinced that the effectiveness of these non-structural safeguards was supported by the Commission's record.[77/] Consequently, the efficacy of non-structural safeguards for enhanced services is in doubt. While the Commission may ultimately find a path to continue to regulate certain LEC affiliate relationships under a Computer III model, the model as it exists does not consider or address how a LEC could use its affiliation with a PCS provider to forestall competition to its core monopoly.

Moreover, as has been extensively documented, non-structural separation rules have not prevented the LECs from improperly cross-subsidizing their regulated and non-regulated activities or from improperly discriminating against competitors.[78/] PacTel itself has been accused of violating the Commission's non-structural safeguard rules. In an audit limited to a review of PacTel's research and development, enhanced services, and yellow pages activities, the National Association of Regulatory Utility Commissioners ("NARUC") found that PacTel had engaged in extensive cross-subsidization despite the presence of numerous accounting "safeguards".[79/] Indeed, NARUC commented that "these safeguards

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77/ See State of California v. FCC, 39 F.3d 919 (9th Cir. 1994).

78/ See, e.g., Investigation Into Southern Bell Telephone and Telegraph Company's Provision of MemoryCall Service, Order of the Commission, Georgia Docket No. 4000-U (1991). See also National Cable Television Association, The Never-Ending Story: Telephone Company Anticompetitive Behavior Since the Breakup of AT&T (1991).

79/ National Association of Regulatory Utility Commissioners, An Audit of the Affiliate Interests of the Pacific Telesis Group (1994) ("NARUC Audit"). This audit report was prepared by the staff of the California Public Utilities Commission and presented to the NARUC Committee on Finance and Technology at the NARUC Summer Meeting in San Diego, California, July 26, 1994.

may be creating the perverse effect of encouraging cross-subsidization."[80] In their examination of PacTel's research and development area, the auditors found:

> -- Pacific Bell's subject experts working on both competitive and non-competitive projects have not been correctly segregating their time between the two business sectors.
>
> -- Pacific Bell made certain infrastructure modifications, at the expense of the general body of ratepayers. Those modifications were mainly to accommodate the development of its competitive enhanced services. However under Pacific Telesis' corporate policy only its shareholders will realize the potential profits from these projects.
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> -- R&D expenditures are co-mingled with other operating expenses. Pacific Bell is unable to delineate expenditures on a per project basis. . . . Because tracking procedures for R&D projects are arbitrarily applied, opportunities for cost shifting would occur
>
> -- The Pacific Telesis Group's decision to retain the potentially lucrative PCS retail line of business for its shareholders is contrary to the [regulatory concept that the rewards of a new product should be assigned to the part of the business that took on the risks of developing the product]. Research and development costs [for PCS] were borne by the general body of [telephone] ratepayers.[81]

The NARUC Audit implies that PacTel improperly allocated its PCS expenses to its monopoly landline business as early as 1992, the same period when PacTel was telling the Commission that non-structural safeguards would be effective in regulating LEC provision of PCS. PCS is a capital intensive business with important competitive implications for PacTel's core landline services. Given this recent history of misuse of non-structural safeguards, the Commission cannot blindly rely on safeguards that are not designed to police the provision of integrated LEC and PCS services in a manner antithetical to competition.

80/ NARUC Audit at ii.

81/ NARUC Audit at B-10 - B-12.

The Commission must require complete disclosure of all LEC in-region PCS financial activity.

C. PacTel Would Incur Few Costs if Improved Reporting Requirements or Structural Separation Were Imposed on Its In-Region PCS Activities

When the Commission established its cellular rules, structural separation for in-region LECs and LEC cellular was the norm.[82/] Since that time the Commission has had, and declined to take, opportunities to let LECs offer cellular service on an integrated basis with landline services.[83/] The Commission also has recognized that the separate subsidiary requirement for LEC ownership of cellular interests "guard[s] against cross-subsidization, discriminatory pricing, and other anticompetitive conduct."[84/]

In other contexts the Commission has determined that requiring LECs to comply with strengthened reporting standards would facilitate the competitive development and deployment of newly deregulated services.[85/] For PCS, as a competitive service, these same arguments apply. Further, in this case, "to reduce shareholder risk," PacTel already has created a separate subsidiary to provide PCS services and a separate subsidiary to hold the

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82/ An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469 (1981), reconsideration, 89 FCC 2d 58 (1982), further reconsideration, 90 FCC 2d 571 (1982), appeal dismissed sub nom., United States v. FCC, No. 82-1526 (D.C. Cir., March 3, 1983).

83/ See, e.g., Second CMRS Report and Order, 9 FCC Rcd at 1492.

84/ Broadband PCS Order, 8 FCC Rcd at 7747

85/ See, e.g., Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, Report and Order, 95 FCC 2d 1117, 1120 (1983).

PCS licenses.[86] Consequently, PacTel already has established a portion of the necessary framework to either parse out in a more detailed and frequent format its PCS-related costs or to structurally separate its PCS and landline telephony services.[87] Even if PacTel were to incur additional costs either to provide more useful information or to structurally separate its PCS business, those costs would be far outweighed by the benefits of requiring additional separation and disclosure

The need to impose stricter safeguards on LEC entry into PCS is evidenced in telecommunications reform legislation pending in the House and Senate.[88] While the overarching impetus of the pending legislation is deregulation of telecommunications, BOC entry into a host of competitive markets, including long distance, video dialtone, manufacturing, telemessaging, alarm monitoring and payphone services is conditioned on the BOC's establishment of structurally separate subsidiaries to provide such competitive services, in addition to an affirmative obligation imposed upon the BOCs to prevent cross-subsidization, nondiscrimination and joint-marketing restrictions.[89] Thus, Congress believes

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86/ See Plan at 3-4

87/ Cox has argued numerous times before the Commission that structural separation of LEC PCS and landline services is the best way to protect against cross-subsidization and improper discrimination. See, e.g., Comments of Cox Enterprises, Inc. filed in GN Docket No. 93-252 at 6-7 (filed November 8, 1993).

88/ See The Communications Act of 1995, H.R. 1555 ("House Bill"); The Telecommunications Competition and Deregulation Act of 1995, S.652 ("Senate Bill"). The House and Senate Bills have both been adopted and are now scheduled to go to the full Conference Committee for reconciliation this fall.

89/ The House Bill requires a BOC to establish a separate subsidiary to provide interLATA video dialtone, electronic publishing and manufacturing services. The House Bill's (continued...)

that buttressed structural separations protections that are stricter than the Computer III non-structural safeguards upon BOC ventures into competitive markets is a deregulatory and pro-competitive step.

D. Adequate Safeguards Must be Imposed After a Reasoned Analysis of LEC-PCS Competitive Implications

The Commission has observed on numerous occasions that safeguards are necessary if LECs are permitted to provide PCS within their landline service areas. The Commission has recognized the competitive concerns of Cox and others but has yet to develop the safeguards that are needed. Now that PacTel has its California and Nevada licenses, and has presented its fatally flawed non-structural safeguards Plan, the Commission must engage in a reasoned analysis and enact essential safeguards.

If the Commission is serious about encouraging local loop competition, it will do more than just ensure that LECs do not unfairly cross-subsidize their service offerings. Pro-competitive regulation on issues such as the use of CPNI, joint marketing and joint billing

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89/ (...continued)
separations provisions require that: (i) transactions between the subsidiary and the BOC be at arm's length; (ii) separate operations and books; (iii) nondiscriminatory provision of services and information; and (iv) prevention of cross-subsidization of subsidiary ventures through BOC ratebases. See H.R. 1555 at Section 246. The Senate Bill requires a BOC to establish a structurally separate subsidiary to provide interLATA services, video dialtone, and manufacturing services. Under the Senate bill, the separate subsidiary must keep separate officers, books, and credit arrangements from the BOC, and must conduct all affiliate transactions on an arm's length and nondiscriminatory basis. The BOC may not jointly market its affiliate's interLATA services unless the BOC permits other entities offering the same or similar service to market and sell its telephone exchange services. The BOC must pay for a joint Federal-State audit every two years. The BOC also has a duty to protect CPNI relating to other common carriers, equipment manufacturers and customers. See S.652 at Section 252.

arrangements, and number portability are needed before any company can attempt to compete with the LECs for a sizable share of the basic local service market. While PacTel may be expected to argue that these are essentially state issues, resolution on the federal level would free potential competitors from having to fight the LECs for the right to compete in all 50 states.

While PacTel and other LECs should not be penalized for being LECs, regulators must ask whether PacTel's success in the PCS market is due not to its individual merit but to favorable internal arrangements that are not available to other competitors, including access to the monopoly telephone ratepayer base. The Commission cannot abdicate its fundamental role in assuring that LEC in-region participation in PCS does not result in unfair competition. The Commission must reject PacTel's Plan and require PacTel to comply with expanded cost allocation and affiliate transaction rules.

IV. PACTEL'S PLAN VIOLATES COMMISSION INTERCONNECTION POLICIES AND IS UNREASONABLY DISCRIMINATORY

PacTel's touted "commitment" to offering "fair and reasonable interconnection to all CMRS providers" is belied by the terms and conditions reflected in the Plan.[90/] PacTel asserts that the interconnection provisions it extends to certain wireless carriers in tariffs on file in California and expected for Nevada provide "an appropriate benchmark for measuring the interconnection services PBMS receives as opposed to that received by other wireless

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90/ See Plan at 9.

providers."[91] However, under existing Commission requirements, a LEC must upon reasonable request engage in good faith negotiations to make interconnection arrangements with a CMRS provider.[92] LECs must also provide interconnection arrangements that: (i) contain mutually compensatory terms and conditions from the LEC for termination of traffic that originates on the LEC's facilities; (ii) provide reasonable charges for LEC interstate interconnection provided to CMRS licensees; and (iii) ensure nondiscriminatory access to any form of interconnection arrangements that the LEC makes available to any other carrier or customer unless the LEC meets its burden of demonstrating that provision of such interconnection arrangement to the requesting CMRS provider is either technically infeasible or economically unreasonable.

PacTel's proffering of its intrastate interconnection tariff is an outright repudiation of the Commission's requisite standards for good-faith negotiation on the terms and conditions of interconnection. To the extent that the types of interconnection in the Plan's proposed "Wireless Carrier" interconnection tariff are derived verbatim from a tariff filed with the California Public Utilities Commission, they cannot support a finding of reasonableness under the Commission's rules. What is more, the Wireless Carrier tariff is still pending and embroiled, as PacTel itself admits, in "a large, complex proceeding [and] it is impossible to predict when or if the tariff will become effective."[93] Even if requiring PCS

91/ Id. at 13.

92/ See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2912-13 (1987) ("1987 Cellular Interconnection"); Second CMRS Report and Order, 9 FCC Rcd at 1497.

93/ See Plan at 7.

competitors to take interconnection under the Wireless Carrier tariff satisfied the Commission's interconnection requirements (which it does not), there is absolutely no demonstration that PacTel's tariff is reasonable, cost-based or otherwise nondiscriminatory.

For example, PacTel extends collocated interconnection to its PCS affiliate but admittedly denies collocation to non-affiliated PCS licensees,[94/] in blatant violation of the requirement that any form of interconnection provided to one carrier must be provided to any similarly situated carriers.[95/] Under PacTel's safeguards Plan, moreover, it is impossible to verify that PacTel is not overcompensating PBMS for traffic terminated on the PCS network or undercompensating itself for PCS traffic that PBMS terminates on the landline network. Without ongoing oversight of PacTel's mutual compensation arrangements, PacTel could easily pay its PCS affiliate more to terminate its landline traffic on the PCS affiliate's network than it would pay a non-affiliated PCS licensee to terminate its traffic by designing particular interconnection arrangements that are unattractive to all but PacTel-affiliated providers. By designing a specialized arrangement, PacTel could also charge its PCS affiliate less to terminate the affiliate's PCS traffic on the landline network than the termination charge for non-affiliated PCS licensees. Unless the costs associated with PacTel's PCS affiliate are separately identified and monitored from PacTel's landline telephone costs, there is no way to

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94/ See Plan at 10.

95/ See 47 U.S.C. § 202(a); Second CMRS Report and Order, 9 FCC Rcd at 1498.

determine whether PacTel is engaging in some form of anticompetitive discrimination by means of biased compensation mechanisms.[96]

PacTel's Plan does not disclose any information to ensure that the terms and conditions of its access and interconnection arrangements with non-affiliated PCS providers do not and will not unreasonably discriminate in favor of its PCS affiliate. The Commission should require ongoing disclosure of the financing, compensation and support for interconnection between PacTel and its PCS affiliate to identify potential violations of the non-discrimination and mutual compensation policies on a going-forward basis.

A. The Plan Violates the Commission's Good Faith Negotiation Requirement

PacTel's attempt to foist its intrastate Wireless Carrier tariff unilaterally upon all PCS licensees makes a mockery of the good-faith negotiation requirement. It is a long-standing rule that LECs may file tariffs reflecting interconnection charges to CMRS providers "only after the co-carriers have negotiated agreements on interconnection."[97] PacTel thus has an obligation, upon reasonable request, to enter into and conclude good-faith negotiations with PCS licensees prior to its filing of a wireless interconnection tariff assertedly to apply to

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96/ For example, the Plan indicates that Pacific Bell will provide the following services to its PCS affiliate: (i) planning and corporate research; (ii) procurement; (iii) real estate; (iv) regulatory representation; (v) sales services; (vi) systems technology; (vii) telephone service; and (viii) training. See Plan, Cost Allocation Manual, at pp. V-1, V-41-V-42. Without disclosure of the costs associated with these facilities and services, it will be impossible to enforce the mutual compensation provisions by determining whether PacTel's interconnection charges to its PCS affiliate, and vice versa, cover their costs.

97/ See Second CMRS Report and Order, 9 FCC Rcd at 1497 n.473 (quoting 1987 Cellular Interconnection Order, 2 FCC Rcd 2910, 2916 (1987)).

any and/or all PCS licensees. The terms and conditions reflected in the Plan's Wireless Carrier interconnection tariff fail to meet this standard.

Upon an inquiry from Cox on interconnection terms with PacTel's landline telephone bottleneck facilities, PacTel merely referred Cox to its pending intrastate tariff. PacTel is under an obligation under existing rules to provide mutually compensatory terms to interconnecting PCS licensees. By directing Cox into an intrastate tariff with a one-way compensation mechanism, PacTel in essence has refused to acknowledge its duty to engage in good faith negotiations. Moreover, PacTel's current safeguard Plan pursues this high handed brush off with myopic consistency. It is telling that PacTel has failed to take even the minimum requisite steps to justify the reasonableness and legality of the interconnection provisions of its safeguards Plan. Since PacTel has been unwilling to enter into good faith negotiations on forms of mutual compensation and terms other than those it provides to cellular operators, it has failed to take even the minimum requisite steps to justify the reasonableness and legality of the interconnection provisions of its safeguards Plan.

The requirement to negotiate in good-faith prior to filing an interconnection tariff is both a legal and policy imperative. Directing PCS operators to a menu of options in a proposed intrastate interconnection tariff that may not include PCS[98/] and may not include interconnection options that a PCS provider may want is not a negotiation. Moreover, the

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98/ The Wireless Carrier tariff is purportedly directed to "permit...the completion of cellular calls, mobile calls, maritime mobile calls, air-to-ground calls (collectively referred to in the proposed tariff as one-way/two-way mobile calls), and one-way paging signals." See Pacific Bell, Wireless Interconnection Services Tariff, at 1, filed in California PUC OANAD Rulemaking (September 1, 1994).

Commission has historically initiated informal proceedings to oversee good-faith negotiations prior to the filing of a LEC interconnection tariff applicable to a particular class of wireless carriers.[99] In this regard, the Common Carrier Bureau recently initiated a series of informal meetings with PCS pioneer preference licensees and LECs to discuss the status of negotiations and proposed rates, terms and conditions of PCS/LEC interconnection and to entertain concerns about proposed arrangements. PacTel's referral to its Wireless Carrier tariff as the only possible approach to interconnection reflects its unwillingness to comply with the bedrock requirement of negotiation and mutual compensation.

99/ For example, with regard to radio common carrier ("RCC") interconnection to the landline facilities of certain wireline telephone companies, including AT&T and GTE, the Commission initiated a public proceeding and a series of informal meetings to resolve questions about whether interconnection with RCCs would be accomplished pursuant to tariff rather than existing intercarrier agreements and whether rates, terms and conditions governing RCC interconnection should be contained in a specific tariff or another tariff or set of tariffs on file with the Commission. See Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service Under Part 21 of the Commission's Rules, Memorandum Opinion and Order, 63 F.C.C.2d 87, 88 (1977). The Commission also adopted a "Memorandum of Understanding" produced by the informal negotiations between the RCCs and AT&T conducted under the Commission's auspices that set forth detailed principles of interconnection, and provisions regarding organization, operations and administrative matters, and intercarrier payments, as well as an illustrative tariff. See id. at Appendix A, 63 F.C.C.2d at 92-116; see also Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service Under Part 22 of the Commission's Rules, Memorandum Opinion and Order, 80 F.C.C.2d 352 (1980). The Commission has also assumed a similar role in the cellular context by issuing a "Policy Statement" to govern the good-faith negotiations of LECs and cellular carriers with specifications as to general interconnection principles, forms of interconnection, NXX codes and telephone numbers and compensation arrangements. See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. 2d (P&F) 1275, 1283-1285 (1986) ("Cellular Interconnection Policy Statement").

B. The Plan Does Not Reflect Reasonable Interconnection Costs

As previously noted, the Commission has issued a Notice on LEC-to-CMRS interconnection that examines existing and potential interconnection arrangements that might assist CMRS providers in their continuing efforts to gain fair and reasonable interconnection from LECs. Several commenters in that proceeding have encouraged the FCC to require that LECs comply with its existing rules requiring mutual compensation that the LECs have never honored.[100/] These commenters have urged adoption of "bill and keep" as a rational, reasonable structure for LEC-to-CMRS interconnection and Cox has demonstrated that, from the standpoint of LEC interconnection cost recovery, it is fair and reasonable.[101/]

PacTel has ignored bill and keep as an easily implemented alternative to its obviously preferred and anticompetitive one-way interconnection charge. It has not identified other alternatives to meet mutual compensation requirements. Mutuality is not even mentioned as an option in the PacTel Plan. The Commission has ample discretion to reject the Plan on this basis alone. Further, the California PUC has recently adopted a bill and keep rule as part of its interim rules for local competition.[102/] Consequently, no conflict between

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100/ See, Comments of Comcast Corporation in CC Docket No. 94-54, filed September 12, 1994 and the attached report "Interconnection and Mutual Compensation with Partial Competition" by Dr. Gerald W. Brock.

101/ See "Incremental Cost of Local Usage" by Dr. Gerald W. Brock (attached as Appendix B). Bill and keep is a compensation system whereby each carrier keeps all charges collected from its customers and carriers do not bill each other for traffic terminated on their networks.

102/ See Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Opinion, R. 95-04-043; I. 95-04-044 (California PUC July 24, 1995).

federal and state regulations will occur if the Commission requires PacTel to adopt a bill and keep compensation arrangement as a way to meet its mutual compensation obligation.

In light of the interconnection violations reflected in PacTel's proposed safeguards Plan, the Commission must seize the initiative and formulate the minimum requirements that LECs providing PCS must meet in providing interconnection to competitors. The answer has to include not only that interconnection be non-discriminatory as among PCS providers, but also that the rates and terms of interconnection do not perpetuate the LEC monopoly local loop bottleneck. At a minimum, the Commission should impose a condition on grant of the Plan that PacTel has concluded good-faith negotiations that in fact make reasonable interconnection available to Cox and other CMRS licensees who will be competing with PacTel's monopoly local loop.

C. The Commission Should Not Allow PacTel To Game Federal and State Regulators to Deny Competitors Compensation

PacTel's conduct in various proceedings before the Commission and the California PUC evidences its willingness and ability to engage in anticompetitive attempts to "game" Commission and state rules. The Commission should reject PacTel's PCS interconnection proposals rather than reward PacTel by allowing it to continue to engage in such anticompetitive actions.

PacTel has advanced positions on LEC-PCS mutual compensation arrangements before the California PUC and the Commission that are brazenly contradictory and in any event violate basic FCC rules. To shirk its federal obligation to provide mutually compensatory terms and conditions of interconnection to PCS licensees, PacTel repeatedly has